No. 22,393

ited States Court of Appeals

FOR THE NINTH CIRCUIT

GREAT FALLS COMMUNITY TV CABLE CO., INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents,

HARRISCOPE BROADCASTING CORPORATION,
SNYDER & ASSOCIATES,
TELEPROMPTER TRANSMISSION OF KANSAS, INC.,
Intervenors.

On Petition for Review of an Order of the
Federal Communications Commission

BRIEF FOR INTERVENORS HARRISCOPE BROADCASTING CORPORATION and SNYDER & ASSOCIATES

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April 27, 1968

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COUNTERSTATEMENT OF THE CASE

In its Statement of the Case, Petitioner provides this Court with its own view of history and with a slanted exposition of the facts herein. Intervenors Harriscope Broadcasting Corporation (hereinafter "Harriscope") and Snyder & Associates (hereinafter "Snyder") have had an opportunity to review the Counterstatement of the Case prepared for submission to this Court by Respondent Federal Communications

Commission. With the additional comments noted hereinafter, the Counterstatement of the Case by the Federal Communications Commission is endorsed and adopted by Intervenors Harriscope and Snyder.

Petitioner's Statement of the Case contains numerous errors, distortions and exaggerations in the treatment of the history of FCC regulation of CATV and of the facts of this case:

> (1) A prime example appears in Petitioner's analysis (Brief, p. 5) of the Commission's and the Congress' consideration of CATV jurisdiction. According to Petitioner, "a 1966 bill to confer jurisdiction over CATV" was followed by the Commission's assumption of jurisdiction in 1965! Of course, as is clear from Petitioner's own reference to the legislative history (Appendix B, p. 54a), the 1966 bill looked toward *confirmation* of jurisdiction over CATV by the FCC. Certainly, the fact that the Commission looked to Congress for confirmation and clarification of jurisdiction in no way undermines the validity of its assumption of jurisdiction over CATV.
>
> (2) Petitioner far over-plays the operating history of its CATV system (Brief, p. 6). Based upon the facts provided by Petitioner itself, the CATV system has shown a steady growth and has reached a position, after six years of operation, whereby the system now expects to produce substantial profits on a relatively fixed investment. Of course, of critical importance is the fact that the growth of the CATV system is a direct concomitant of

adverse impact on the audience and rates of the local television stations.

(3) Petitioner persists in asserting that compliance with the Commission's non-duplication rule " will eliminate about 60 per cent of the service" of its Great Falls CATV system and will "destroy" the system. It has already been shown to this Court, at the oral argument on Petitioner's Motion to Stay, that the record reflects that less than 25% of Petitioner's CATV service would be affected by the Commission's Order. This percentage is based on Petitioner's own figures provided in R. 11, *et seq.* Regardless of the percentage loss of service to the Petitioner, the important fact is that the public will not be deprived of the availability on the same day of one single television program. Compliance with the Commission's Order would leave Petitioner with sufficiently attractive program offerings to insure the continued viability of its operation.

(4) In emphasizing the amount of program material required to be deleted from its systems, Petitioner neglects the elementary fact that the two local television stations in Great Falls, licensed to Intervenors Harriscope and Snyder, can, by definition, carry only two television programs at one time. Deletion of the programs carried by the Great Falls stations, on a same-day basis, would leave Petitioner with a competitively attractive array of program offerings:

(a) First and foremost, at least one entire "schedule" of national network programs will be available, since there are only two local stations and three national television networks;

(b) Assuming the correctness of Petitioner's allegation that its system can provide the signals of "the local television stations free of 'ghosting' or reception problems caused by the terrain or local interference," such benefits will continue to be provided to the public by the Petitioner;

(c) A time and weather service originated by the Petitioner over its CATV system;

(d) FM radio signals, some of which are newly added to Petitioner's system pursuant to the Commission's Order here under consideration;

(e) Programs of Educational Television Station KUED from Salt Lake City, Utah. The programming of this station will continue to be available as an incentive for the continuance of public subscription to Petitioner's CATV system.

This handsome array of program offerings constitutes the minimum which Petitioner can continue to sell to the public in and around Great Falls. Thus, present subscribers and potential subscribers to Petitioner's CATV system will continue to have substantial incentive to support the service, even as modified by requiring nonduplication protection for the local television stations.

ARGUMENT

I.

THE FCC HAS FULL STATUTORY AUTHORITY AND JURISDICTION TO REGULATE MICROWAVE-FED CATV SYSTEMS

> Petitioner maintains that the issue of jurisdiction over CATV is independent of the means of delivery of the signals, whether off-the-air or microwave-fed. (Brief, p. 10)

Petitioner's assertion, quoted above, is analytically and legally incorrect. The factual and legal distinctions between CATV systems which receive signals of television stations off-the-air, and those which are microwave-fed, have already been recognized by this Court. In *Southwestern Cable Co. v. United States,* 378 F. 2d 118, *certiorari* granted 389 U.S. 911, this Court questioned the Commission's authority to issue proscriptive orders in advance of hearing affecting a *non*-microwave-fed CATV system, but evidenced no quarrel with the heretofore undoubted Commission authority to order compliance with reasonable regulations by a *licensed* entity. This Court cited the leading case upholding the Commission's authority to regulate microwave carriers which serve CATV systems: *Carter Mountain Transmission Corp. v. Federal Communications Commission,* 321 F. 2d 359 (C.A.D.C. 1963), *certiorari* denied 375 U.S. 951.[1]

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[1] This Court also discussed *Mesa Microwave, Inc. v. Federal Communications Commission,* 262 F. 2d 723 (C.A.D.C. 1958) in terms of "a case dealing with CATV problems" and a decision dealing with "the licensing authority."

A complete analysis of the Commission's regulatory power over the microwave carrier and, consequently, its CATV customer is set forth in the Brief of Respondent Federal Communications Commission. This analysis is endorsed and adopted by Intervenors Harriscope and Snyder.

Petitioner concedes (Brief, p. 20) that the Commission has full authority to deny an application for a microwave license, upon a record finding that the proposed service is inconsistent with the public interest. A total denial of a microwave license would, of course, completely deprive a CATV system of any opportunity to provide distant signals over its system. To argue, as Petitioner does, that the Commission can deny a microwave license completely, in the public interest, but cannot condition the grant of such a license — permitting the provision of some service and restricting other aspects of the service — is legally and logically unsound.

II.

THE COMMISSION'S CAREFUL BALANCE OF CATV AND BROADCAST INTERESTS IS FAIR, REASONABLE AND RESTRAINED

From the outset, the Commission has been required to balance the competing considerations of CATV and broadcast services. After rule making proceedings, the procedural adequacy of which is not questioned by Petitioner, the Commission concluded that CATV (a) can complement the broadcast services by making available to various communities a greater choice of television and other programming, and (b) at the same time, represents a threat to local television service, particularly to service to rural areas. The threat to

off-the-air television service to rural areas is a matter of particular concern in the sparsely populated areas of western states such as Wyoming and Montana, because it is economically unfeasible for CATV systems to lay wires reaching out to sparsely populated rural areas beyond the cities and towns of concentrated population. To make the role of CATV complementary rather than antagonistic to local television service, the Commission has simply required that CATV systems not compete unfairly with the local television stations. This result is accomplished by imposing a requirement that the CATV system not duplicate, on the same day, programs provided by local stations.

The rates for advertising which can be charged by local television stations are based on the audience reached by those stations. To the extent that CATV systems furnish the same programs as are carried by local television stations, the audience of the local stations is fragmented and the revenue of such stations is decreased. When it is considered that, in the case of national television network programming, the television stations have bargained for program exclusivity in their service areas, the unfairness of the importation into the home base of the television station of signals pirated from other stations by the CATV systems, becomes apparent. Unless some restriction is placed on the development and growth and operation of CATV systems, in Great Falls and elsewhere throughout the country, the present over-the-air television system could be completely eliminated.

Petitioner's contentions that the Federal Communications Commission, absent direct licensing authority, cannot regulate CATV business; that the Commission's non-duplication rules violate the First Amendment and operate in restraint of trade; and that the Commission's Order, entered without an evidentiary hearing, was made in violation of Petitioner's

right to due process of law, have all been consistently rejected by Courts of Appeals throughout the country. See, *e.g.*, *Buckeye Cablevision, Inc. v. Federal Communications Commission*, 387 F. 2d 220 (C.A.D.C., 1967); *Presque Isle TV Co., Inc. v. Federal Communications Commission*, ____ F. 2d ____ (C.A. 1, Dec. 18, 1967);[2] *Wheeling Antenna Company, Inc. v. Federal Communications Commission*, ____ F. 2d ____ (C.A. 4, Feb. 28, 1968); and *Conley Electronics, Inc. v. Federal Communications Commission*, ____ F. 2d ____ (C.A. 10, Apr. 22, 1968). In these decisions by the District of Columbia, First, Fourth and Tenth Circuits, the validity of the Commission's careful balance of the competing interests of CATV and local television have been recognized. The matter is concisely stated in the *Wheeling Antenna Company* decision of the Fourth Circuit:

> Nor on the merits do we see error in the Commission's judgment. Appreciation of its problems is reflected in the history of CATV's origin, its development and its relation to television nationwide. It is primarily a televisionary complement. Further, a CATV system is very largely dependent upon the existence of a live station, from which is obtained its stock in trade—TV programs. Indisputably, the service it performs is nonetheless a valuable contribution to our way of life and constitutes an important industry.
>
> Lest this companion threaten the vitality of national television, the Commission early and constantly looked for ways of blending the usefulness of both. Channel 9 Syracuse, Inc. v. FCC, 385 F. 2d 969, 970 (D.C. Cir. 1967); Second Report and Order, 2 FCC 2d 725, 745-46 (1966). Televisors were placed so as to assure both their permanence and

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[2] This matter was remanded to the FCC for further consideration of the particular facts of the case.

their service to the public, as contemplated by the Communications Act of 1934, supra, 47 USC 151, 307(b). Establishment of the contours was designed to prevent CATV from disrupting the pattern, and to keep CATV and TV in "complementary rather than conflicting roles." First Report and Order, 38 FCC 683, 699 (1955).

For its survival, of course a station needs financial support. Commercial advertisements are a chief source and these are attracted by the number of a station's viewers, for they are the advertisers' prospective customers. Consequently, to insure its permanence a station is entitled to some protection against dilution of its coverage through CATV's introduction of the same programs from more removed stations. In weighing the hurt to CATV against the help to TV, there are several considerations besides the hope of preserving the station as a local and national asset. One is the fact that the local station is put to substantial expense in procuring programs, while CATV has so far been able to use them without sharing this burden.[7]

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7 A decision holding that CATV can be subjected to copyright liability will soon be reviewed by the Supreme Court. See Fortnightly Corp. v. United Artists Television, 377 F. 2d 872 (2 Cir. 1967), cert. granted, 36 USL Week 3226 (U.S. Dec. 5, 1967) (No. 618).

> On balance, we cannot say the Commission has not been impartial in fulfilling its obligations. Neither the rules nor their administration are shown to be unjust, including the particular rule now in suit. Seemingly, it represents a fair adjustment and accommodation of conflicting claims to first place in the public interest. Cf. Channel 9 Syracuse, Inc. v. FCC, supra, 385 F.2d 969, 971, and Carter Mountain Transmission Corp. v. FCC, supra 321 F.2d 359, 363, cert. den. 375 US 951. The Commission's order is an even-handed and justified execution of this policy. . . .

The decision of the Tenth Circuit Court of Appeals in *Conley Electronics Corporation v. FCC, supra,* by Chief Judge Alfred Murrah, is not only the most recent Court of Appeals decision in this area but also a most comprehensive refutation of allegations similar to those made by Petitioner herein. As that Court stated the questions, there were challenged therein (a) the validity of the Commission's non-duplication rule, based upon the assertion that it is outside the jurisdiction of the Commission and violative of the First Amendment; and (b) the Commission's failure to provide an evidentiary hearing, as violative of various procedural statutes and constituting a deprivation of due process of law. The Court specifically noted that the Commission's adoption of the non-duplication rules was based upon its determination that, otherwise, CATV systems would engage in "unfair competitive practices" and its concern that, ultimately, CATV might deprive the public as a whole of free television service, particularly service to outlying areas, and local service with local control and selection of programs. The Court, in essence,

completely affirmed both the Commission's jurisdiction and authority to adopt the non-duplication rule, and its application thereof to the CATV system involved in that case. Reference to the facts in the *Conley* case will quickly reveal that the Petitioner in this case has made no significantly different allegation of fact which would warrant different treatment.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

STANLEY B. COHN